64

(2)

No. 07-95

FILED

AUG 27 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

COMPAQ COMPUTER CORPORATION,

Petitioner,

v.

STEPHEN GRIDER and BEVERLY GRIDER, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Third Division

BRIEF IN OPPOSITION

LINDA G. ALEXANDER
Counsel of Record
JOHN C. NIEMEYER
NIEMEYER, ALEXANDER, AUSTIN & PHILLIPS, P.C.
300 North Walker Ave.
Oklahoma City, OK 73102
(405) 232-2725

Counsel for Respondents

August 27, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	Basis for Jurisdiction	1
II.	Constitutional Provisions and Statutes Involved	1
III.	Statement of the Case	2
	A. Response to Petitioner's Statement of the Case Regarding the Texas Proceedings	3
	B. Response to Statement of the Case Regarding the Oklahoma Proceedings	5
IV.	Summary of the Argument	7
V.	The Argument	7
	A. Jurisdiction on Certiorari Is Not Present Under 28 U.S.C. § 1257	8
	B. The Full Faith and Credit Clause Is Not Implicated Here	12
	C. Oklahoma's Choice of Law Regime Passes Constitutional Muster Under Due Process	19
VI.	Conclusion	26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. McCurry, 449 U.S. 90 (1980) 14

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 23

Baker v. General Motors Corp., 522 U.S. 222 (1998) 14, 15, 16

Bethley v. Louisiana, 520 U.S. 1259 (1997) 8

Carnegie v. Household Intern. Inc., 376 F.3d 656 (7th Cir. 2004) 18

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 7

Estin v. Estin, 334 U.S. 541 (1948) 14

Florida v. Thomas, 532 U.S. 774 (2001) 11

Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488 (2003) ..... *passim*

Hansberry v. Lee, 311 U.S. 32 (1940) 14

In re: Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003) 18

In re: Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) 18, 19

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997) 8, 9, 10, 11

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) 24

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 14, 16

TABLE OF AUTHORITIES – Continued

Page

Martin v. Wilks, 490 U.S. 755 (1989) 14

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 9

Momand v. Universal Film Exchange, 43 F.Supp. 996 (D.C.Mass. 1942) 16

Nevada v. Hall, 440 U.S. 410 (1979) 17

O'Dell v. Espinoza, 456 U.S. 430 (1982) 10

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Pink v. A.A.A. Highway Exp., 314 U.S. 201 (1941) 24

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 9

Richards v. Jefferson County, 517 U.S. 793 (1996) 14

Richards v. U.S., 369 U.S. 1 (1962) 25

San Remo Hotel, L.P. v. County of San Francisco, 545 U.S. 323 (2005) 14

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) ..... *passim*

Williams v. State of North Carolina, 317 U.S. 287 (1942) 24

STATE CASES

Barbara's Sales, Inc. v. Intel Corp., 857 N.E.2d 717 (Ill. App., 5th Dist. 2006), *appeal allowed*, 861 N.E.2d 653 (Nov. 29, 2006) 18

Collins Radio Co. of Dallas, Texas v. Bell, 1980 OK CIV APP 57, 623 P.2d 1039 21

TABLE OF AUTHORITIES – Continued

Page

Compaq Computer Corp. v. LaPray, 135 S.W.3d 657 (Tex. 2004) ..... *passim*

Greghol Ltd. Partnership v. Oryx Energy Co., 1998 OK CIV APP 111, 959 P.2d 596 7

Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675 (Tex. 2002) 20

McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961) 14

Mostek Corp. v. Chemetron Corp., 642 S.W.2d 20 (Tex.App. 5 Dist., 1982) 12

Perry v. Meek, 1980 OK 151, 618 P.2d 934 7

Shell Oil Co. v. HRN, Inc., 144 S.W.3d 429 (Tex. 2004) 20, 23

Shields v. Bridgestone/Firestone, Inc., 2004 WL 546883 (Tex.Dist. Mar. 12, 2004) 19

Torrington Co. v. Stutzman, 46 S.W.3d 829 (Tex. 2000) 20, 22

Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, 81 P.3d 618 ..... *passim*

FEDERAL STATUTES

FED. R. CIV. P. 23 7

FED. R. CIV. P. 23(b) 4

28 U.S.C. § 1257(a) 1, 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

OKLA. STAT. tit. 12 § 2008 (West 2000) 3

TEX. BUS. & COM. CODE § 1.301, Comments 3 and 4 ... 6, 12

TEXAS CODE ANN. R. CIV. P. 42(b)(3) 4

TEXAS CODE ANN. R. CIV. P. 45 3

OTHER AUTHORITIES

Restatement of Conflicts § 6 .....20, 22

Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893 (Summer, 2005) 20

I. Basis for Jurisdiction

Although Petitioner asserts the provisions of 28 U.S.C. § 1257(a) as the basis of this Court's jurisdiction, jurisdiction is not properly invoked in this case.

Under 28 U.S.C. § 1257(a), the Supreme Court's jurisdiction on certiorari to the State Courts is limited to final orders. Although the order at issue certified a class and is appealable as of right under Oklahoma state law (and procedural rules), such orders are expressly interlocutory in nature.

II. Constitutional Provisions and Statutes Involved

28 U.S.C. § 1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

III. Statement of the Case

To quote its internal documents, Compaq admits that it sold computers with a "major feature not working."[1] The "major feature not working" is a floppy disk controller chip ("FDC"). What is missing from this FDC are control logic circuits (wires) that are required to handle a normal computer operating state known as an "overrun or underrun." The missing circuits are required by industry specifications and standards.[2] The symptoms associated with this defective FDC include corrupted and missing data on both floppy *and* hard disks, corruption of applications like Word, failures in backup systems, computer crashes and computer freezes. Before it shipped these computers, *Compaq itself* internally concluded that this FDC is a "defect," that this FDC is a "major feature not working," or a "main feature failure." The "impact of the defect on the customer" is "severe." Compaq's own "plain English" guide characterizes the severity of the defect as: **"Stop everything and fix this sucker."**

Consistent with Compaq's internal assessment, Compaq's own records and witnesses establish that Compaq customers *do* complain about the symptoms associated with this defective FDC, including complaints about malfunctions, lost data and data corruption. The Griders personally experienced these symptoms.

---

[1] Compaq graded this defect as either a severity rating "1" or "2." The least severe rating was a "2" which means a "major feature not working."

[2] Compaq's *own* corporate representative *witnesses* and experts, Taylor, Lewallen, Neuhauser and Flynn, testified to the industry specifications and standards that require FDCs to properly detect 100% of all overruns and underruns.

Why would Compaq knowingly ship a product with a "major feature not working" and with circuits missing in the hardware? Why would Compaq ship a product with a defect graded "Priority 1" when Compaq's written policy for a "Priority 1" defect required it to "Stop everything and fix this sucker"? Because, before shipping these computers, Compaq concluded that a customer would usually assume that the failure was caused by a bad floppy disc, and would not blame Compaq for the problem. Following this conclusion, Compaq decided to reap a profit by selling the computers without fixing the defect and "accept the associated risks" such as this lawsuit.[3]

A. Response to Petitioner's Statement of the Case Regarding the Texas Proceedings

Respondent takes issue with the Petitioner's analysis of the Texas Supreme Court proceedings. The Petitioner's statement is erroneous or overreaching in the following respects. First, while there was, and is, an allegation that the computers at issue in these two cases are "defective in the box," there has been no admission that such defect does *not* result in malfunction. In fact, the evidence is that the defect does cause a malfunction. In any event, there is no *pleading code* requirement in either Texas or Oklahoma, which requires a specific allegation of "malfunction" at the pleading stage. TEX. R. CIV. P. 45, OKLA. STAT. tit. 12 § 2008. *See* Petitioner's brief at 2 n.1.

---

[3] Compaq shipped the computers with a formal, written, executive management decision "Will Not Fix." This designation means that Compaq has decided to "accept the associated risks" of shipping the computer with the defect. Management acknowledged the validity of the defect designation but decided to ship the product anyway.

Respondent also seriously overstates the Texas Supreme Court's holding in *Compaq Computer Corp. v. LaPray,* 135 S.W.3d 657 (Tex. 2004). In reversing the class certification before it, the Texas Supreme Court found that the trial court failed to "rigorously analyze" cohesiveness under Rule 23(b), and with respect to Rule 42(b)(3) that the trial court's failure to determine what law would govern was improper. The critical question before the Court was "whether the trial court conducted a proper choice of law analysis and correctly decided that Texas law controlled." *Id.* at 672, Petitioner's Appendix G at 69a. The Texas Supreme Court addressed trial court's decision that there existed: "*no real conflict between Texas law and the laws of any other jurisdiction with equally substantial connections to this dispute.*" *Id.* at 673, Petitioner's Appendix G at 69a (emphasis added). Because the trial court and the lower appellate court in Texas failed to analyze "the differences, if any, of the laws of other states" they erred. *Id.* at 673, Petitioner's Appendix G at 70a. Finally, with respect to the choice of law, the Texas Supreme Court found that "the class representatives have *failed to demonstrate* [Texas law] will apply to the claims of out-of-state class members." *Id.* at 681, Petitioner's Appendix G at 85a (emphasis added). The Supreme Court's reversal was thus based on the failure of the Texas class representatives to demonstrate that Texas law would apply, and the trial and appellate courts' erroneous finding that it was unnecessary to make that decision. To the extent that Petitioner bases its argument on the Texas Supreme Court's further discussion of "choice of law" and the "most significant relationship" it bases its argument on pure *dicta.*

Moreover, the Texas Supreme Court *never* "expressly rejected the trial court's assertion that Texas law could

govern the claims of all class members." Petition for a Writ of Certiorari at 3. *Nor* did the Texas Supreme Court *ever* state that "Texas does not have a cognizable interest in applying its warranty law to the claims of non-Texas consumers." Petition at 4. The language used by the Court is clearly qualified and limited. The Court finds that other jurisdictions "are likely" to have an interest; Texas law "may not" adequately protect consumers; and Texas policies "might tend" to favor the manufacturer since that is the "home state" of the defendant. *Id.* at 681, Petitioner's Appendix at 84a. Such statements are a far cry from the pronouncements asserted by Compaq.

B. Response to Statement of the Case Regarding the Oklahoma Proceedings

Contrary to Petitioner's statement that a stay was entered so that the Oklahoma courts could "have the benefit" of the *LaPray* decision, the Griders voluntarily entered into the stay, on the basis of comity, because *LaPray* was the "first filed" case. The stay was lifted when the decision in *LaPray* was handed down by the Texas Supreme Court, and there was no longer a "first filed" nationwide class.

Petitioner's Statement of the Case also contains overstatements which bear directly on the arguments made subsequently in its Petition. For instance, Petitioner's assertion that the trial court "did not address" the Texas statute that "expressly limits" application of the Texas Uniform Commercial Code to transactions that "bear an appropriate relation" is misleading in two respects. First, the trial court's order on choice of law discussed, as it should, Oklahoma's choice of law determination, and not

the substantive law of Texas, the law that was ultimately found to apply. Second, the Texas statute referenced certainly does not "expressly limit" the Uniform Commercial Code's application. TEX. BUS. & COM. CODE, § 1.301, cmt. 2.

As has been repeatedly corrected in the pleadings and briefing below, the trial court did not ignore the named plaintiffs' contacts with Oklahoma, *see* Petitioner's Appendix F, at 41a II. A. ¶¶ 4, 5 and 23, or their so-called "stated expectations" that Oklahoma law would apply.[4] The reason that the plaintiffs' certification record "relied heavily" on the evidentiary record developed in the Texas action was because of an agreement between the parties (strongly encouraged by the trial court) that the discovery previously made in the Texas cases could be used in the Oklahoma case. The purpose of that agreement was to avoid costly and duplicative discovery. Even though plaintiffs' Oklahoma evidentiary presentation included excerpts from Compaq employees and expert witnesses deposed in the Texas case, the presentation was designed to address Oklahoma's requirements for certification of a class action. Contrary to Petitioner's assertion, those procedural requirements in the Oklahoma action were different from those in the Texas action, as were the arguments on choice of law. The suggestion that the trial court failed to consider potential conflicts between the laws of Oklahoma and other states is almost laughable: had the trial court not considered that potential conflicts of law existed, *there would have been* no order on choice of law. Finally, although

---

[4] Mr. Grider's belief was that all of Oklahoma's law, *including its conflicts laws provisions,* would apply.

not fatal to the conflicts of law finding in any event, Compaq overstates the method used by the Court of Appeals in its analysis of the most significant relationship. While the analysis has been described as being undertaken at the "class level," it was not so limited. The Court of Appeals makes clear that it is measuring the potential relationships of each of the states (in which computers were sold) as against the relationship of the state of Texas to the parties "and the litigation." Petitioner's Appendix B, 13a.

IV. Summary of the Argument

Jurisdiction is lacking, because the decision sought to be reviewed is not final. In any event, Full Faith and Credit applies only to final judgments, not to interlocutory, procedural decisions. Oklahoma's conflicts rules, as applied in this case, are not arbitrary or unreasonable, and do not run afoul of the Due Process Clause.

V. The Argument

The "right of a litigant to employ Rule 23 is a procedural right only." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980). This simple statement, obvious as it may seem, is central to the disposition of the Petitioner's request for Certiorari. Just as the certification of a class under FED. R. CIV. P. 23 does not constitute a final judgment or decree, the Oklahoma trial court's decision to certify a class action is not a final judgment or decree under Oklahoma law. *Greghol Ltd. Partnership v. Oryx Energy Co.*, 1998 OK CIV APP 111, 959 P.2d 596 (citing *Perry v. Meek*, 1980 OK 151, 618 P.2d 934, 941). More importantly, Oklahoma's application of its own

choice of law rules to its own class action statute is in no way in violation of the Full Faith and Credit Clause, and the result of Oklahoma's application of the "most significant relationship test" to the facts in this case is "neither arbitrary nor unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 817 (1985).

A. Jurisdiction on Certiorari Is Not Present Under 28 U.S.C. § 1257

The Supreme Court's jurisdiction to review a decision of a State Court is limited, under 28 U.S.C. § 1257(a) in two respects which are applicable here: first, the decision sought to be reviewed must be "final"; second, the final decision must implicate a Constitutional claim. The first aspect of jurisdiction is missing entirely; the second, a true Constitutional question, is also missing.

That the Supreme Court's review of a state court decision is "confined to '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had' " is well recognized. *Bethley v. Louisiana*, 520 U.S. 1259 (1997) (*mem.*) (quoting 28 U.S.C. § 1257(a)). While most usually discussed in the context of the writ of habeas corpus, this jurisdictional limitation is applied in civil and criminal cases alike. Where the determination of the state court is interlocutory in nature, as is this, certiorari will be denied. *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1997). In *Jefferson,* the Alabama Supreme Court decided the issue of whether the Alabama law, which allowed for recovery of only punitive damages for wrongful death, also governed recovery on a federal civil rights claim when the decedent's estate alleged the death resulted from deprivation of federal rights. After

initially granting certiorari to answer the question, the Supreme Court found, because the case had been remanded after determination of the federal question: "This case, still *sub judice* in Alabama, was brought to this Court too soon." *Jefferson*, 522 U.S. at 77. The Court concluded that it lacked jurisdiction, because:

> Congress has limited our review of state-court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The decision we confront does not qualify as a "final judgment" within the meaning of § 1257(a). The Alabama Supreme Court decided the federal-law issue on an interlocutory certification from the trial court, then remanded the cause for further proceedings . . .

The Court concluded that a "firm final judgment rule" was established by the statute:

> To be reviewable a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 569 (1945).

> The Alabama Supreme Court's decision was not a "final judgment." It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims. In the relevant respect, this case is identical to *O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982) *(per curiam)*, where we dismissed the writ of certiorari for want of jurisdiction. *See ibid.* ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation.'" (citation omitted)).

Jefferson, 522 U.S. at 81-82.

Nor is this case one in which the "exceptions" to the finality rule apply. The Supreme Court has divided those exceptions into four categories: (1) cases where, although additional proceedings will be had, the federal issue is conclusive or the outcome of further proceedings preordained; (2) cases where the federal issue will survive and require decision regardless of the outcome of future state-court proceedings; (3) cases in which the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the ultimate outcome of the case; and (4) cases in which the state courts have finally decided the federal issue with further proceedings pending in which the party seeking review in this Court might prevail on the merits on nonfederal grounds, thus rendering

unnecessary review of the federal issue by this Court, but reversal of the state court on the federal issue would be preclusive of any further litigation, rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. *Florida v. Thomas*, 532 U.S. 774, 777-778 (2001), citing *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479-483 (1975).

Here, as in *Jefferson*, further proceedings could moot any federal question that might exist. Any number of scenarios present themselves: If the class is "decertified," the issue becomes moot. If Petitioner prevails on the merits of the case, the issue becomes moot (and it is unlikely that Petitioner would then feel aggrieved by the result of the certification, by reason of the application of nationwide "true" *res judicata*). On the other hand, should Petitioner lose on the merits and the federal question does not become moot, Petitioner will still be free to seek review of the alleged Constitutional issues when the state-court proceedings reach an end and a final judgment or decree is entered.

The second requirement for certiorari is the existence of a true Constitutional issue. As will be seen in detail below, there is no true Constitutional issue presented here. As noted by Justice Stevens in his opinion concurring in part and dissenting in part in *Shutts*,[5] in the absence of a demonstration of an unambiguous conflict in the established laws of connected states, state-court choices of law are not reviewable. Strikingly absent from the Petition is

---

[5] *Shutts*, 472 U.S. 797, 823-824 (1985) (Stevens, J., concurring in part and dissenting in part).

suggestion that there are Uniform Commercial Code provisions with "unambiguous conflicts" as among the various states. Further, it strains credibility to suggest that application of Texas law to the defendant (or to the class) rises to the level of an "arbitrary or fundamentally unfair" choice – when the Texas Supreme Court has stated that it would apply that law to its own citizens and against its citizen defendant, Compaq, had a "non-class" case been filed between the parties. *LaPray*, 135 S.W.3d at 681. Suffice it to say here, that the Full Faith and Credit Clause is not implicated in this interlocutory decision, and the Oklahoma Court's application of its own rules on choice of law is neither arbitrary nor unfair.

B. The Full Faith and Credit Clause Is Not Implicated Here

Petitioner attempts to raise a Constitutional issue by asserting that the class certification order in this case offends the Full Faith and Credit Clause of the U.S. Constitution. It does not. First, and foremost, the opinion of the Texas Supreme Court, as analyzed by the Oklahoma Court of Appeals, does not "conclusively determine" Texas' relationship to the issues in this case.[6] The statements

---

[6] Petitioner's interpretation of the scope of the application of the Uniform Commercial Code in Texas is incorrect for another reason. Texas courts have often relied on Uniform Commercial Code Comments. *See, e.g., Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20 (Tex.App. 5 Dist., 1982). Comments 3 and 4 to TEX. BUS. & COM. CODE § 1.301 state:

> 3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. . . . Application of the Code . . . may be justified by its comprehensiveness, by the policy of uniformity,

(Continued on following page)

made by the Court in *LaPray* are not only tentative in nature, they are *dicta* in the most classic sense. In response to Compaq's argument in the Oklahoma Court of Appeals, that Court stated:

> This is too broad a reading of the decision. The Court in *LaPray* did not find Texas had no interest in having its law applied. The Court faulted the lower courts for "failing to conduct a state-by-state analysis of the questions of law presented . . . and having found conflicts in law which it deemed substantial, the Court rejected 'the application of Texas law on the basis that the law of all jurisdictions is identical.'" The Court then concluded that "while Texas law will apply to claims by most of those who bought computers in this state, the class representatives *have failed to*

---

and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries.

4. The Act does not attempt to prescribe choice-of-law rules . . . but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

These comments explicitly address the extra-territorial application of the Texas Uniform Commercial Code. Texas has embraced application of Texas law outside of the state, particularly where it will encourage uniformity of the law. Ironically, Compaq's own corporate representatives Snelling and Mondshine testified a customer's residence was irrelevant to Compaq's decisions about how a warranty was interpreted. Differences in the states' laws were not considered, evidencing Compaq's lack of expectation that liability under a warranty would be affected by any given state's law.

> *demonstrate* it will apply to the claims of out-of-state class members."

Petitioner's App. B, 12a (citations omitted, emphasis in original).

Second, the provisions of the Full Faith and Credit Clause require the existence of a final judgment. The Texas Supreme Court's decision in *LaPray* is not a final judgment. While the decision is, of course, binding on the lower court as the pronouncement of a superior court, it was not final. Indeed, in *each of the cases cited by Petitioner* in which the Full Faith and Credit Clause is addressed, there was a final adjudication of merits.[7] The underpinning of the Full Faith and Credit Clause is the finality of the judgment at issue.

---

[7] *Allen v. McCurry*, 449 U.S. 90 (1980) (final judgment of federal district court dismissing § 1984 suit *aff'd* where criminal defendant had opportunity to litigate search-and-seizure claim in criminal case); *Baker v. General Motors Corp.*, 522 U.S. 222 (1998) (final judgment of injunction cannot "dictate to a court in another jurisdiction that evidence . . . shall be inadmissible"); *Estin v. Estin*, 334 U.S. 541 (1948) (judgment of separation and alimony); *Franchise Tax Brd. v. Hyatt*, 538 U.S. 488 (2003) (*aff'g* denial of writ of mandamus); *Hansberry v. Lee*, 311 U.S. 32 (1940) (final judgment attempting to bind non-parties to prior judgment violated due process); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (final judgment applying Kansas statute of limitations *aff'd* as not violating Full Faith and Credit or Due Process Clauses); *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982) (final decision of New York Supreme Court *aff'g* decision of Human Rights agency entitled to preclusive effect); *Martin v. Wilks*, 490 U.S. 755 (1989), superceded by statute, Civil Rights Act 1991, Pub. L. No. 102-166, 105 Stat. 1078 (final judgment dismissing case on basis of prior judgment *rev'd*, even though party was aware of suit and did not intervene); *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1961) (final divorce decree); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (final Alabama judgment that prior litigation barred current claims *rev'd* on due process grounds); *San Remo Hotel, L.P. v. County of San Francisco*, 545 U.S. 323 (2005) (final judgment in takings case).

Third, although Petitioner asserts that a state may not override another state's express conclusion that its own laws do not govern particular claims, it is telling that no citation to authority follows that bold statement.[8] Equal protection considerations aside, the statement that there should be "no different result" in (a) the application by Oklahoma of a Texas statute and (b) the *dicta* from an interlocutory decision of a Texas Court is so contrary to this Court's prior decisions as to be practically irresponsible. As this Court has stated: "Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. GMC*, 522 U.S. 222, 232 (1998) ("full faith and credit does not require a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate . . . a final judgment qualifies for recognition throughout the land.") It is the *finality* of the *judgment* as to the parties involved which requires compliance with Full Faith and Credit. Even then, the scope of application of the judgment must be measured by the bounds of claim and issue preclusion.[9] In discussing a

---

[8] Petitioner apparently complains that the *amicus* brief by the Texas Attorney General did not cause a change of heart in the Oklahoma Supreme Court. But the Attorney General's brief expressed only an interest *in having Texas law properly applied to Texas consumers* – something that would clearly be done by applying Texas law to Texas class members. It is puzzling to think that the Texas Attorney General would have any interest in interfering in the business of the Oklahoma Court otherwise. In fact, Compaq's interpretation of the Texas Attorney General's position would have Texas exporting its policy to Oklahoma.

[9] The cases cited by the Petitioner are federal cases which implicate *res judicata* and collateral estoppel, the Anti-Injunction and All Writs Acts. Petitioner attempts to create a "conflict between the Circuits" and asks the Court to resolve that "straw" conflict between the Federal Circuits, in this case, where no Federal Circuit is involved.

similar situation, the Court in *Baker* observed that commentators have cautioned that to require dismissal of an action in one state, which has been enjoined in another would mean, in effect, that "one court can control what goes on in the courts of another." *Baker*, 522 U.S. n.9 (citation omitted.) The doctrine of Full Faith and Credit was never intended to be stretched so far.

The distinction between a court's determination of an interlocutory, procedural, issue and a final judgment is important in another respect. Although the Petitioner asserts that courts "would not tolerate" a plaintiff moving to another state after a disappointing *procedural ruling*, that is clearly not the case. In fact, Oklahoma's "savings statute" OKLA. STAT. tit. 12 § 100 specifically anticipates the re-filing of a case which is dismissed "otherwise than on the merits." A plaintiff did just that, in *Momand v. Universal Film Exchange*, 43 F.Supp. 996 (D.C.Mass. 1942) (originally filed in the Western District of Oklahoma, properly re-filed in Massachusetts, pursuant to Oklahoma's savings statute). Of course, Petitioner's quotation from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 at 485, comes from its discussion of a final judgment. *Kremer* does not address an interlocutory order. *See* n.7 *supra*.

In a similar vein, Petitioner's gloss on the Court's footnote in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 n.1 takes the quotation so totally out of context as to be misleading. Contrary to Petitioner's implication, *Sun Oil* acknowledges that a State "may apply its own procedural rules to actions litigated in its courts." *Id.* at 723. Petitioner's reference to *Sun Oil*, 486 U.S. at 731 is misleading in another respect. Although the Oklahoma courts decided

it was proper, under Oklahoma's choice of law rules, to apply Texas law, that has not yet been done. Thus, for the Oklahoma Courts to have "contradict[ed] the law of another state" is impossible.

The Full Faith and Credit Clause merely "sets certain minimum requirements" which each state must observe when asked to apply the law of a sister state. In an extensive analysis, *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003), discussed the evolution of the concept of Full Faith and Credit as it applies to states' determinations of the choice of laws rules. There, the Court declined to create some sort of standard that would recognize even the "core sovereignty" of a sister State, citing *Nevada v. Hall*, 440 U.S. 410 (1979). Quoting *Hall,* the Court found that, *vis a vis* Nevada, a California Court assuming jurisdiction of, and applying its law to matters occurring outside of Nevada "'. . . poses no substantial threat to our constitutional system of cooperative federalism.'" *Hyatt* at 497. The Court concluded that such suits could "'hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities.'" *Id.* at 497. The same is true here. It is difficult to see how applying Texas law to this case would interfere with Texas' capacity to fulfill its own "sovereign responsibilities." *Id.* at 495.

Apparently recognizing the weakness of its position, Petitioner concedes that the decision *not* to certify a class does not involve a merits decision. Nonetheless Petitioner would have this Court fashion a new rule regarding finality of judgments, and impose that rule on both the federal and state courts (without, one might add, the guidance or input of Congress). To justify this redefinition of finality, Petitioner asserts a supposed conflict among the

Circuits – even though the conflict, if one exists, is not laid at the doorstep of the states in general, or this specific decision by the Oklahoma Courts. This case is not the appropriate venue in which to resolve some asserted conflict among the Circuits. However, because Compaq makes much of the assertion, a short discussion may be appropriate. The issue revolves around the question of whether denial of class certification in one federal court can be asserted to enjoin another action elsewhere. The clear majority of Circuits addressing the issue have determined that such injunction, because it cannot bind class members of a non-existent class, cannot have preclusive effect. The lone case cited by Petitioner discussing such an injunction, *In re: Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003) belies its own ruling,[10] by finding that the injunction issued did not preclude state only cases, and that it might not preclude a "settlement class."[11] The Seventh Circuit's opinion was prophetic. The case was ultimately settled, on a

---

[10] Of course, Oklahoma declined to follow the appellate court's decision in *In re: Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) embracing instead the lower court's analysis. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, n.4. *Bridgestone/Firestone*'s continuing persuasiveness is questionable in light of *Barbara's Sales, Inc. v. Intel Corp.*, 857 N.E.2d 717 (Ill. App., 5th Dist. 2006), *appeal allowed*, 861 N.E.2d 653 (Nov. 29, 2006) (applying California law to nation-wide class based on "significant relationship" test.).

[11] The Seventh Circuit was addressing its perception of a federal doctrine of preclusion, one not accepted by the majority of courts. Interestingly, the opinion also recognizes: "Each state may apply its own choice-of-law rules . . . in a way that a federal court . . . could not." *Bridgestone/Firestone, Inc.*, 333 F.3d 766. *See also*, *Carnegie v. Household Intern. Inc.* 376 F.3d 656 (7th Cir. 2004) (*Bridgestone/Firestone* did not hold an order denying class certification is binding in future litigation. The decision was "more nuanced.").

nationwide basis, ironically in Texas state court. *Shields v. Bridgestone/Firestone, Inc.*, 2004 WL 546883 (Tex.Dist. Mar. 12, 2004).[12]

The present case, in which one state's procedural rules are applied in a different manner, with a different result from another state's, should not be allowed to morph into a decision based on a perceived conflict among the federal circuits.

In this case, there is no final judgment, there is no application of Texas law (whether "contradiction" or "misconstruction") to the certification issues; and there is no issue of "full faith and credit." Here, as in *Hyatt,* this court should "heed the lessons learned," and "decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Hyatt,* 538 U.S. at 499.

C. Oklahoma's Choice of Law Regime Passes Constitutional Muster Under Due Process

In the context of this case, dealing with choice of law, "the minimum requirements imposed by the Due Process Clause are . . . the same as those imposed by the *Full Faith and Credit Clause.*" *Sun Oil Co. v. Wortman*, 486 U.S. 717, at 736 n.2, concurring opinion by Brennan, J. (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797

[12] Query: if the class was not certifiable because its choice of law ran afoul of commonality, *Bridgestone/Firestone*, 288 F.3d 1012, 1015, and the elements of certification must be met in a settlement class, how is it that the same class might be certified for settlement purposes?

(1985)). Therefore, as in *Sun Oil,* the discussion of due process here will be brief.

At its base, Petitioner's argument rests on the assertion that Oklahoma is required to follow Texas' special class action choice of law rule announced in *Compaq Computer v. LaPray*, 135 S.W.3d 657 (Tex. 2004). Compaq's underlying assertion really has nothing to do with the Constitution, or Compaq's home state. The difference in results is completely explained by choice of law. Oklahoma follows *Restatement of Conflicts* § 6 principles and has given those principles great weight.[13] Texas apparently rejects those principles in a class action.[14] While in other cases, Texas Courts have found Texas "has a significant interest in . . . applying Texas law to product defect cases brought against Texas manufacturers",[15] Texas Courts apply a different, special rule in class actions.[16] It is as simple as that.

---

[13] *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 2003 OK 17, ¶ 16

> The needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions.

[14] *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 700 (Tex. 2002).

[15] *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 850 (Tex. 2000). *See also, Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004) (Texas law applied to sale of goods manufactured in Texas with "several hundred lessee dealers in seventeen different states").

[16] "Texas decisions have established two choice of law rules. The first rule affects the burden of displacing Texas law with that of another jurisdiction. The second rule concerns the choice between Texas law and the law of another jurisdiction. Both of these rules magically disappear in a national class action." Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893, 896 (Summer, 2005).

If a state's rule on choice of law choice does not otherwise offend the United States Constitution, the State is free to make such choice of law as it sees fit. *Hyatt*, 538 U.S. 488. Here, Oklahoma has clearly adopted the "most significant relationship" test for U.C.C. express warranty claims. *Collins Radio Co. of Dallas, Texas v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039 (U.C.C. warranties). *Ysbrand* applied the rule to express warranty class actions involving multiple states. The Court in *Ysbrand* discussed the various contacts Michigan had with the parties and the litigation, including that, by virtue its being the principal place of business of the defendant, Michigan was the place of the design, manufacture and distribution of the minivans at issue. The Court then compared those contacts with those of other states in which the vehicles were sold. There is no need to repeat the exhaustive and sound explanation made by the *Ysbrand* Court. *Ysbrand* recognized that, in a nationwide express warranty class action, all 50 states bear some relationship to the parties and the transaction by virtue of nationwide sales. The Oklahoma Supreme Court framed the question: "Whether the relationship of each state where the product was purchased was more significant than that of the principal place of business of the defendant." *Ysbrand* at ¶ 14. The answer in *Ysbrand* and here is the same, "no." As in *Ysbrand,* the only state where conduct relevant to all class members occurred is the state of the principal place of business of Compaq – Texas. The decision in *Ysbrand* advances the goals of uniformity and predictability. It is the settled law of the State of Oklahoma.

In its application of *Ysbrand's* rule on choice of law, the trial court did not ignore the interests of the other

affected jurisdictions, it found that computers were sold to consumers "in each of the fifty states and District of Columbia, including Oklahoma."[17] In its conclusions of law, the trial court addressed the relationship of states other than Texas, in which the computers were sold, finding, in accord with *Ysbrand,* that the place of contracting, and location of the goods is of "diminished significance."[18]

Further, the trial court did not "disregard" the decision of the Texas Supreme Court. Rather, the trial court correctly determined that Oklahoma law controlled the choice of law decision. Texas did not, in *LaPray* or elsewhere, state that Texas has "no interest" in regulating the conduct of corporations in that state. In fact, the opposite is true. "But Texas . . . also has a significant interest in protecting resident defendants. . . . And other *Restatement* factors weigh in favor of applying Texas law. For example, much of the conduct that allegedly caused the injury occurred in Texas." *Torrington,* 46 S.W.3d 850. *See also, Shell Oil Co.,* 144 S.W.3d 429 (Tex. 2004) (applying Texas law to a contract for sale of goods manufactured in Texas with "several hundred lessee dealers in seventeen different states"). So, in individual cases Texas applies Texas law to product defect cases brought against Texas manufacturers. Texas simply applies a different choice of law rule in class actions. In fact, the trial court's decision specifically addressed the Texas Court's decision in *LaPray* and found it to be contrary to Oklahoma's choice of law.

---

[17] Petitioner's Appendix F at 43a ¶ 23.

[18] *Id.* at 44a, ¶ 5.

The rule developed in *Ysbrand* is not "radical" nor is the trial court's treatment of the rule here. The list of relevant contacts with Texas included some twenty-five elements. None of these were discussed in *LaPray*. The court specifically found that Texas had the most significant relationship to the case before it.

Oklahoma's application of its own choice of law rules does not run afoul of the decision in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818 (1985). The Court in *Shutts* followed the holding in *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981), finding: "the Due Process Clause and the Full Faith and Credit Clause provided *modest* restrictions on the application of forum law." *Shutts*, at 818, quoting *Allstate,* at 312-313 (emphasis added). *Shutts* requires only a "significant contact" or "aggregation of contacts" "creating state interests." *Id.* at 818.

Applying *Shutts,* it is clear that there is an aggregation of contacts with Texas. The trial court found at least twenty-five factual contacts with the precise issues in this litigation. The fact that a court's *dicta* may be stretched to imply that it has disavowed an interest does not mean that the interest no longer exists. In any event, as noted above, Texas has not rejected an interest in claims of non-residents against Texas residents.[19] In fact, *LaPray* specifically recognized that, "express warranty claims in Texas may be governed by Texas law if the transaction bears an 'appropriate relation to this state.'" *LaPray*, 135 S.W.3d at 680.

---

[19] *See, Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004).

The distinction between *LaPray* and *Grider* is the application of each state's choice of law rules. Compaq's argument implies an intent on the part of the Texas Supreme Court to abdicate Texas' "state interest" in the conduct of its corporate citizens by judicial fiat. There is no indication of that in *LaPray*. Even if there were, Texas may not export that abdication to another state. In fact, if Texas truly intended that result, the attempt would violate the Constitution: " . . . the law of neither can, by its own force, determine the choice of law for the other." *Pink v. A.A.A. Highway Exp.*, 314 U.S. 201, 209 (1941). The "very nature" of the union and the sovereignty of each state "precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy . . . to the laws and policy of others." *Id.* at 210. While the plaintiffs clearly do not believe this was the intent of the Texas Supreme Court in *LaPray,* it is apparently Petitioner's intent. Contrary to Petitioner's suggestion, there is no Constitutional prohibition against a state applying the law of a single state to a multi-party action.[20]

This is not an attempt by Oklahoma to apply its own law. The trial court, after an extensive review of the facts and the law, made a reasoned determination, based on Oklahoma's recognized choice of law rules, that the law of another state (Texas) would apply.[21] The Supreme Court

---

[20] Similarly, "It is not for the federal courts to thwart the right to pursue such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941).

[21] *Williams v. State of North Carolina*, 317 U.S. 287, 302-303 (1942) ("what is a permissible limitation on the full faith and credit clause does not involve a decision . . . as to which state policy . . . is the more desirable one.").

has acknowledged the move toward "interest analysis" in conflicts of laws.[22] Similarly, in a concurring opinion in *Sun Oil Co. v. Wortman,* 486 U.S. 717, 735-736 (1988), Justice Brennan reinforced the ability of a state to make its own conflicts analyses.

In the final analysis, what Compaq advances as Constitutional arguments are merely disguised arguments for "comity." Of course, it should not be the purview of the Supreme Court to referee skirmishes between the states over issues of comity.

The last several pages of the Petitioner's plea for certiorari give lie to the assertion of a Constitutional issue here. The Petition is nothing more than an attempt to invoke some perceived legislative function of this Court, in derogation of the ability of states to fashion their own policies. The "disturbing trend" cited by Petitioner is only disturbing to Petitioner because the choice of law analysis adopted by Oklahoma gives real effect to the underlying purposes of the class action statute, the *Restatement of Conflicts* and the Uniform Commercial Code.

---

[22] *Richards v. U.S.*, 369 U.S. 1 (1962):

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity. Thus, an Oklahoma state court would be free to apply either its own law, . . . or the law of Missouri . . . to an action brought in its courts and involving this factual situation. *Richards*, 369 U.S. 12-13 (1962) (footnotes omitted.)

VI. Conclusion

Review is sought here of an interlocutory order of an Oklahoma trial court. Because it is not a "final order" this Court lacks jurisdiction to review on certiorari. The trial court's order certifying the class in this case is based on settled choice of law principles which offend neither the Full Faith and Credit Clause nor due process.

The Petition for Certiorari should be denied.

Respectfully submitted,

LINDA G. ALEXANDER
Counsel of Record
JOHN C. NIEMEYER
NIEMEYER, ALEXANDER, AUSTIN
& PHILLIPS, P.C.
300 North Walker Ave.
Oklahoma City, OK 73102
(405) 232-2725

Counsel for Respondents